No. 13,673

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO), and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al.,
Appellees.

Appeals from the United States District Court for the District of Oregon.

APPELLANTS' OPENING BRIEF.

GLADSTEIN, ANDERSEN & LEONARD,
NORMAN A. LEONARD,
240 Montgomery Street San Francisco 4, California.
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment in favor of plaintiff-appellee, Hawaiian Pineapple Company,

Ltd., a corporation (hereinafter referred to as Pineapple) and from an order denying a motion for verdict in accordance with motion for directed verdict or in the alternative for a new trial (hereinafter referred to as the motion for a new trial) made on behalf of defendant-appellants International Longshoremen's and Warehousemen's Union (hereinafter referred to as International) and International Longshoremen's and Warehousemen's Union, Local 8 (hereinafter referred to as Local 8). (TR 177, 146.)[1]

The proceeding was commenced by Pineapple against the International and Local 8 and several score individual defendants by a complaint alleging that the cause of action arose under §303 of the Labor Management Relations Act of 1947, Act of June 23, 1947, c. 120, §303, 61 Stat. 158, 29 U.S.C.A. §187). (TR 1.) After defendants below had filed motions to dismiss, to strike, and to make more certain (TR 14-14d), as well as answers (TR 14d-29), the trial Court granted Pineapple leave to file an amended complaint. (TR 30.) The amended complaint in one count alleged jurisdiction on the grounds of diversity of citizenship (TR 31) and in two other counts alleged jurisdiction on the grounds of §303 of the Labor Management Relations Act of 1947, *supra*. (TR 44-45.) In all three counts Pineapple generally alleged a conspiracy on the part of the defendants to injure the plaintiff's business by preventing the unloading of

[1]There is also presently before this Court an appeal by Pineapple from that portion of the final judgment which was rendered in favor of individual defendants-appellees and from an order denying Pineapple's motion for a partial new trial. (TR 178-179.)

a cargo of pineapple shipped from the Hawaiian Islands to the United States.

The motions and answers originally filed were deemed directed to the amended complaint. (TR 201-203.) At a pre-trial conference the Court refused to rule upon the legal questions presented by the various motions (TR 203, 291), because "the pleadings are going to pass out of this case". (TR 188.) A motion to sever this case from assault and battery cases brought by two employees of Pineapple was denied. (TR 226-227, 307, 318.) A pre-trial order was drawn up embodying the contentions of the parties and the issues to be litigated. (TR 50-76.)

After trial, the jury returned a verdict in favor of the two employees and against the individual defendants there involved. The claims of these individuals have been settled and no appeal affecting them is now before this Court. The jury also returned a verdict in favor of the individual defendants-appellees and against Pineapple. But the jury found for Pineapple and against the International and Local 8, and assessed damages in the sum of $201,274.42. (TR 136.) Judgments in accordance with this verdict, i.e., one in favor of the individual defendant-appellees (TR 137-139) and one in favor of Pineapple in the amount specified (TR 140-141) were duly entered.

The motion for a new trial on behalf of the International and Local 8 (TR 146) was denied (TR 148), as was Pineapple's motion for a partial new trial. (TR 142).

In its opinion denying the motions for a new trial, the Court below held that the complaint stated a cause of action "under the Federal Labor Management Relations Act * * * [and] * * * under the common law". (*Curto v. International Longshoremen's & W. Union,* 107 F. Supp. 805, 809.)[2] (TR 155.)

Appellants do not concede that the complaint stated a cause of action or that the trial Court had jurisdiction thereof.

Jurisdiction of this Court over this appeal is conferred by 28 U.S.C.A. §§1291 and 1294(1).

STATUTES INVOLVED.

Section 303 of the Labor Management Relations Act of 1947, *supra,* upon which Pineapple allegedly bases its cause of action, reads in relevant part as follows:

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

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[2]The above-cited case is the report of the trial Court's opinion on the post-trial motions. It is captioned as it is because, as indicated, there were also involved below the cases of two individual employees of Pineapple who claimed to have been injured in a melee occuring during the alleged boycott.

"(1) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

* * * * * * *

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.[3]

"(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the

[3]It is not clear to appellants whether Pineapple relies upon subsection 4, *supra*, although some claim was made below that that section had relevance. The Court did not instruct on that subsection, however. It is included here only in the event that Pineapple should assert it is applicable.

parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT OF THE CASE.

In the summer of 1948 there occurred an extended strike of longshoremen in the Hawaiian Islands, the chief protagonists being, on the one side, International's Local 136 (not a party to this proceeding), and on the other, the largest of the Hawaiian employers, popularly known as "The Big Five". The strike represented the culmination of many years of industrial turmoil in the Islands and was the result of an effort of the Hawaiian working people to free themselves from the literally substandard conditions under which they had theretofore had to live and work. (TR 537.)[4] The employers adopted an arrogant, intransigeant attitude in the course of the strike and rejected all offers to settle by either direct negotiation or arbitration. (TR 540 ff.; Ex. 23.)

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[4] "Q. Did he [Meehan] tell you that over the years those five corporations, which dominated the economic life of the Hawaiian Islands, had paid to workers in Hawaii wages at a starvation level? Did he tell you that? A. He did, sir.

Q. Did he tell you that his union and its locals in Hawaii, particularly the Hawaiian Local No. 163, had organized those workers who were receiving those starvation wages, and were endeavoring to raise the standard of living of those people? Did he tell you that? A. Yes, he did.

Q. And did he tell you that the Hawaiian Pineapple Company was controlled and dominated by those five large corporations? Did he tell you that?

A. Yes, I believe he did. It was quite a complete summary, sir." (TR 537.)

Pineapple, which had close economic ties with the Big Five (TR 1073-74, 1166-78), knew that it would be difficult if not impossible to transport cargo from the Islands to the United States by the methods it normally used. (TR 1018, 1289.) Despite this fact and the further fact that Pineapple's contracts with its customers in the United States contained clauses which relieved it from liability for failure to deliver in the event of strike conditions (TR 958-9, 1161, 1292), Pineapple proceeded to assemble cargo in the Islands to be shipped to the United States.

Pineapple, through a wholly owned subsidiary (TR 50), chartered a tug to transport a barge-load of pineapple to the United States. Although the pineapple was allegedly destined for the company's packing plant in San Jose, California, the cargo was shipped not to the Bay Area but to the Pacific Northwest. (TR 540, 1289.) Although the Port of The Dalles was not a port at which ocean-going vessels ever called or which had ever discharged trans-Pacific cargo (TR 544), Pineapple directed its barge to that port for the purpose of having it unloaded there. Prior to the arrival of the barge at the Port of The Dalles, the Port Commissioners agreed to unload the barge, although the port had no facilities for unloading the barge, had no employees, no hiring facilities (TR 545), and in effect had nothing but a dock at which the barge could tie up and a raiload spur from which the cargo could then be transported.

About a hundred miles west of the Port of The Dalles was the metropolitan city of Portland, with

tremendous wharfage and dock facilities and thousands of skilled longshoremen (members of Local 8) who made their living and supported themselves and their families by loading and discharging cargo. For the Port of The Dalles, which was a small port that handled an occasional load of wheat, to attempt to undertake under non-union conditions the discharging of a carload of trans-oceanic cargo represented an obvious threat to the economic well-being of the Portland longshoremen.

Therefore, when it became known in the City of Portland that the Port of The Dalles was undertaking longshore operations without consulting with the union and apparently was about to employ farmhands to perform this work at sub-union wages, a good many of the Portland longshoremen traveled from Portland to The Dalles to investigate the situation. (TR 1239, 1263, 1365.) They were in the city for two or three successive days late in September, 1948, after the barge arrived there and it is true that on the second or third day that they were there, a riot erupted on the dock as a result of which considerable physical damage was done to the dock property and some to the property of Pineapple.

One of the witnesses called by Pineapple—an assistant chief of police (TR 592)—described what happened as follows:

> "Q. Would you tell the jury just what happened—I want you to describe the beginning of this invasion of the dock.
>
> * * * * * * *

A. Well, as I stated before, two flatbed trucks had come in——

Mr. Krause. Q. I don't want you to repeat that. I want you to tell us something about the manner in which it was accomplished, the rapidity with which it was done, and anything else you can tell us about the attitude of the men.

A. Well, it just flared up in a moment. It just flared up like that and was over within just a very few minutes.

Q. The entire riot, you mean?

A. The entire riot, yes." (TR 608-609.)

* * * * * * *

"Q. And then somebody said, 'Come on, you sons-of-bitches. Are you going to let them break our strike?' or words to that effect?

A. Yes, sir.

Q. And that was, as you said a moment ago, completely spontaneous, wasn't it?

A. Yes, sir.

Q. In other words, just as though somebody had thrown a match into a can of gasoline and it went up in smoke?

A. Just about that fast." (TR 632-633.)

Thereafter injunction proceedings were brought in the State Courts and after protracted litigation and negotiations, at the conclusion of which the Port paid union wages (TR 488), the barge was finally unloaded and the cargo transported to San Jose.

It is appellants' contention here that despite the evidence of violence,[5] the judgments cannot stand because of serious errors of law which occurred below.

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[5] "The fact that physical violence was threatened should not be allowed to confuse the picture." (Staley J., in *United States v.*

SPECIFICATIONS OF ERRORS.

1. The trial Court erred in giving certain instructions and in refusing to give other instructions dealing with questions of agency which arose during the course of the trial as follows:

A. The trial Court erred in instructing the jury as follows:

> "The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan were agents and representatives of Defendant Local 8." (TR 1432.)

An exception to this instruction was duly noted. (TR 1462.)

B. The trial Court erred in failing to instruct the jury as requested by appellants as follows:

> "The jury may find the existence of an agency in the absence of prior authorization only where the jury finds from subsequent acts assent and ratification by the principal of the conduct of

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Kemble, 198 F.2d 889, at 899, wherein a conviction against a union for an alleged violation of the Hobbs Act [18 U.S.C. (1940 ed.) 420d; 18 U.S.C.A. 1951] was reversed.)

See also *NLRB v. International Rice Mill Co.*, 341 U.S. 665, 672 ("In the instant case the violence on the picket line is not material"), and *International Union Etc. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253 ("While the * * * Board is empowered to forbid a strike because its purpose * * * is illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property").

the agent. However, in order to find such assent and ratification, the jury must find an adoption of the agency by the principal with a full knowledge of its nature and character and with an intent to adopt it at all events and under all circumstances. Unless the jury so finds, it cannot find that subsequent conduct amounted to a ratification. In other words, if you find that by its conduct after September 28, 1949, the International Longshoremen's and Warehousemen's Union ratified and adopted the acts complained of at The Dalles on that day, you may find the International Longshoremen's and Warehousemen's Union responsible for the results thereof. But, if you find that the action of the International Longshoremen's and Warehousemen's Union after September 28, 1949, was not with an intention to ratify or adopt such acts, but was prompted by humane motives and out of a desire to help the individuals who were then in trouble, I instruct you that such action does not constitute a ratification by the International Longshoremen's and Warehousemen's Union and you cannot find the International Longshoremen's and Warehousemen's Union responsible for the acts at The Dalles because of such subsequent action." (Defendants' Proposed Instruction No. 7, TR 1483-1484.)

"I further instruct you that if you find that it was the defendant herein, Matt Meehan, who was acting solely and only as the agent of Local No. 8, then I instruct you that you may not hold the International Union liable for any act or any statement made or any act or thing done by said

defendant, Matt Meehan." (Defendants' Proposed Instruction No. 28, TR 1485-1486.)

"I further instruct you that with respect to the doctrine of agency, a person may be an employee or agent of one person or organization, and nevertheless may do something in the interests of another person or organization. It is perfectly consistent with the law, and the rules of agency, that in acting for other persons he has a perfect right so to do without committing his actual employer or principal to any liability or responsibility. In other words, in this case, while Mr. Meehan was an employee of the International Union it is perfectly consistent with the rules of agency and employment for him to have done acts and things for any other organization as that organization's sole agent and without binding the International or rendering the Internationl Union responsible therefor." (Defendants' Proposed Instruction No. 33, TR 1487-1488.)

"I further instruct you that in relation to this matter of agency, that it is probably contended by the plaintiff, Hawaiian Pineapple Company, that Matt Meehan was the agent of the International Union. I therefore instruct you, that any principal at any time may alter, change or limit the extent of an agent's power and authority to bind the principal—as for instance, a principal may limit an agent's authority in the commercial field to buy with no power to sell; or a principal may limit an agent's authority to sell and have no authority to buy. So, in this case, the International Union at any time had the full

and complete right, ability, authority and power to limit the authority of Matt Meehan even though Mr. Meehan remained on the payroll of the International Union. In other words, during the entire period of time with which we are here concerned, the International had the power and authority to limit Mr. Meehan to representing local unions in local situations. And, if you find, from all of the circumstances in this case, from a reasonable interpretation of the facts, that it was the purpose and intention of the International and they did any and all things necessary to exercise their intention, to so limit the authority of Mr. Meehan, that during this period of time he was not to represent the International, then I instruct you that nothing Mr. Meehan did during that period of time could bind the International Union." (Defendants' Proposed Instruction No. 37, TR 1488-1489.)

"I further instruct you, that if you find in this local situation in which Local No. 8 was involved that Mr. Meehan's authority was limited to represent Local No. 8 only, then you may not hold the International liable for anything said or done by Mr. Meehan." (Defendants' Proposed Instruction No. 38, TR 1489.)

Exceptions to the failure to give the foregoing instructions was duly noted. (TR 1451, 1452, 1454.)

2. The trial Court erred in failing adequately to instruct the jury on the doctrine of minimization of damages, its total instruction on the subject being as follows:

"In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages." (TR 1441-1442.)

An exception to the inadequacy of this instruction was duly noted. (TR 1457.)

3. The trial Court erred in failing to instruct the jury as requested by the following proposed instructions that the expression of views or opinion was protected activity even under the provisions of the Labor Management Relations Act of 1947 and could not be the basis of liability.

"I further instruct you, ladies and gentlemen, with respect to any alleged boycott in this case, that it was not against any law of the United States, including the Taft-Hartley law, for the longshoremen to talk to the truck drivers employed by the Hawaiian Pineapple Company and advise them of the fact, either (a) that the pineapple was 'hot', as that phrase is understood in this proceeding; or (b) that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen." (Defendants' Proposed Instruction No. 45, TR 1490.)

"I further instruct you, that it was not a violation of the section of the Taft-Hartley Law under

which plaintiffs are suing, for the defendants, or any of them, to speak to the truck drivers or other employees of the Hawaiian Pineapple Company, even if you find that such speech amounted to an inducement or encouragement to those employees to cease working for the Hawaiian Pineapple Company." (Defendants' Proposed Instruction No. 46, TR 1490-1491.)

"I instruct you, that under the provisions of the Taft-Hartley Law, the expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be considered by you to be evidence of a violation of the law, if such expression contains no threat, or reprisal, or force, or promise of benefit. (29 USCA, 158(c).)" (Defendants' Proposed Instruction No. 47, TR 1491.)

An exception to the failure to give these instructions was duly noted. (TR 1455.)

4. The trial Court erred in giving certain instructions, and in refusing to give other instructions, dealing with questions of liability under the Labor Management Relations Act of 1947 as follows.

A. The trial Court erred in instructing the jury on the elements of liability under said Act as follows:

"If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or

encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object of forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described.

"Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freightways, Oregon-California-Nevada Fast Freight, or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff's cargo or with the object of forcing or requiring either

Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover." (Tr. 1424-1426.)

Exceptions to these instructions were duly noted. (TR 1454-1455, 1457.)

B. The trial Court erred in instructing the jury on the elements of liability under said Act as follows:

"You may consider whether or not the conversations which were held by certain individuals of the longshoremen with the truck drivers employed by the Hawaiian Pineapple Company were for the purpose of inducing or encouraging said employees of the plaintiff Hawaiian Pineapple Company or any employee of any other employer to take concerted action in the course of their employment to refuse to perform any services as to the pineapple. You may consider that also to determine whether it was an object of any inducement or encouragement which you may find to force any person to cease dealing with the Hawaiian Pineapple Company. If so, you will in connection with the other instructions which I have given you determine whether that action was illegal or actionable. And that would be true whether such individuals advised the truck drivers of the fact either that the pineapple was 'hot,' as the phrase is understood in this proceeding, or that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen, provided,

of course, that you find the acts were done as I have set forth in the previous instructions and that the purpose was as outlined." (TR 1427.)

An exception to this instruction was duly noted. (TR 1458-1460.)

C. The trial Court erred in failing to instruct the jury as requested on the theory of primary boycott as follows:

"If you find that there was a primary strike against Castle and Cook and that Castle and Cook owns and controls the Hawaiian Pineapple Company to such an extent as to dominate its business practices and policies, then I instruct you, that you may consider Castle and Cook as the primary plaintiff herein. If you should so find then I further instruct you, that the strike or boycott in this case is a primary strike or boycott and you may not award any damages against the defendant, save and except for the actual destruction of property or personal injuries sustained." (Defendants' Proposed Instruction No. 29, TR 1486.)

"I further instruct you from the evidence in this case, that the strike referred to as taking place in Hawaii from May to about the middle of October of 1949, was a lawful strike, not in violation of any law of the United States or of Hawaii.

"I further instruct you the trade unions are organizations favored by the public policy of the United States and that people may join trade unions and participate therein, and in so doing have the approval of the public policy of the

United States." (Defendants' Proposed Instruction No. 30, TR 1487.)

The trial Court compounded this error by specifically instructing the jury as follows:

"There is no evidence in this case that this was a primary strike as far as the Hawaiian local was concerned.

"There is no evidence in this case that the Hawaiian Pineapple Company had any strike of its own employes, or that it was picketed, or that there was any difficulty at the time that the barge left Hawaii." (TR 1431-1432.)

Exceptions to the failure to give the requested instructions and to the instruction given were duly noted. (TR 1453.)

5. The verdict is contrary to the law and the clear weight of the evidence.

6. The verdict is so excessive as to have been rendered as a result of passion or prejudice.

7. The verdict is inconsistent.

SUMMARY OF ARGUMENT.

1. A vital issue in the case was whether or not Meehan was an agent of the International or Local 8, and whether or not Meehan and Toby Christiansen were agents of Local 8. By instructing the jury that these men along with others were in fact agents, the trial Court denied to appellants a jury trial on this

issue. This error of the trial Court was prejudicial and requires a reversal of the judgments irrespective of how compelling or convincing the evidence might have been. The question was one of fact to be determined by the jury and it was error to direct a verdict, in effect, against appellants.

2. The exculpation from liability of Meehan, admittedly an employee of the International, and Christiansen and Baker, admittedly employees of Local 8, requires that the judgment against appellants be set aside. Appellants' liability could only be based upon a *respondeat superior* theory. Appellants could obviously only function through human beings. If the human beings were found not to be liable for the acts complained of, then appellants are not liable.

3. Liability under the Labor-Management Relations Act of 1947 can arise only if there is a secondary boycott and the activity is engaged in for the objects enumerated in the statute. That was not the case here and the failure of the trial Court to instruct properly on the elements of liability under the statute was prejudicial error. The trial Court's refusal to instruct on appellants' theory of primary boycott and its refusal to entertain proof to show the economic relationship between Pineapple and the struck stevedoring companies in Hawaii was also prejudicial error. Appellants were entitled to instructions respecting their right to communicate freely their views on the controversy, and the trial Court's refusal to give such instructions as requested was prejudicial error.

4. The instruction on minimization of damages was inadequate and the jury's assessment of damages failed to take into account uncontroverted record evidence that the damages could have been minimized but were not. The prejudice engendered by the testimony concerning the two injured employees of Pineapple undoubtedly contributed to this result and therefore the failure to grant appellants' motion to sever those cases from this resulted in prejudice to appellants.

ARGUMENT.

I.

THE TRIAL COURT ERRED IN TAKING THE ISSUE OF THE EXISTENCE OF AN AGENCY RELATIONSHIP FROM THE JURY.

When the trial Court charged that "Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the defendant International * * * and that Toby Christiansen and Matt Meehan were agents and representatives of defendant Local 8" (TR 1462), it deprived appellants of a jury trial on the issue and *pro tanto* invaded the province of the jury.

A. The existence of an agency relationship was clearly an issue in this case.

Throughout the proceedings the existence of an agency relationship between the International and Local 8 and the above-named individuals was a sharply contested issue of fact. The pretrial order

reveals that appellant unions contended that neither Meehan nor any of the named individuals were the agents of the International in relation to any of the matters set forth in plaintiff's contentions. (TR 64.) The trial Court, itself, recognized the contested status of this question by formulating one of the issues in the pretrial order as follows:

> "(12) Was either Local 8 or any of the individual defendants named the authorized representative or agent of the International?" (TR 67.)[6]

Thus both the pleadings, and the pretrial order which superseded the pleadings, posed the existence of the agency relationship as one of contested fact.

There was evidence in the record from which the jury might have found that no agency relationship existed as between any of the above-named individuals and the International. There was evidence that defendant Meehan represented only Local 8 in the matters about which plaintiff complained. (TR 1197-1198, 1335, 1336-1337, 1348.) There was evidence that the International exercised no control over, and issued no instructions to, Meehan affecting matters in The Dalles (TR 763, 782, 787, 1213-1214, 1358, 1371-1372.) There was evidence that Bodine was not even employed by the International. (TR 717.) There was evidence that Schmidt was merely an employee of the International and not its agent with respect to the

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[6]Two other issues embrace the same problem, *viz.*: "(6) Did the International engage in the acts and conduct alleged by plaintiff" and "(7) Did Local 8 engage in the acts and conduct alleged by plaintiff?" (TR 66.)

matters that occurred in The Dalles. (TR 704.) Similarly as to Gettings, there was evidence that he was not an agent with respect to The Dalles incidents. (TR 700-704.) The existence in the record of such contrary evidence as appellant is likely to call to the attention of this Court will not answer appellant's basic contention: that it was the function of the jury, not the Court, to decide whether Pineapple had established by a preponderance of the evidence, the existence of an agency relationship.

B. Appellants' proposed instructions were consistent with the theory that the existence of agency was a contested issue.

Appellants proposed instructions based upon the pleadings and the evidence in this case which, if given, would have required a jury finding on the question of agency relationship. (Supp. TR 1484-1488, Nos. 9, 28 and 33.) Upon the Court's failure to give these proposed instructions appellants' counsel specifically objected:

> "With respect to the matter of agency, your Honor stated categorically to the jury and you informed them that Meehan, Gettings, Schmidt and Bodine were agents of the International Union. We respectfully take exception to that instruction, and we say that the evidence shows that Meehan, Gettings and Schmidt were employees of the International Union and not agents, and that the evidence shows that Bodine was an employee of the Joint Union-Employer Committee and not even an employee of the Union. But, in any case, whether any of these people were agents is a question that should go

> to the jury and they should not have been instructed as your Honor did that these four named persons were agents of the International Union." (TR 1462.)

The trial Court responded to this clear objection by saying:

> "I will have to take a chance on that one." (TR 1462.)

Hence there was more than ample opportunity for the Court to have given proper instructions which would have permitted the jury to exercise its rightful function as the finder of fact on the vital agency questions presented.

C. The existence of the agency relationship should have been submitted to the jury.

Whether an agency relationship exists is a question of fact for the jury (*Mitton v. Granite State Fire Ins. Co.,* 196 F. 2d 988 [1952]; *Pacific Can Co. v. Hughes,* 95 F. 2d 42 [1938]; *Riverside Fiber & Paper Co. v. O. C. Keckley Co.,* 32 F. 2d 23 [1929]; 3 *C.J.S.,* Agency, p. 323, §330; 2 *Am. Jur.,* Agency, p. 359, §454; Mechem, *Outlines of Agency,* 3d ed., §§ 106, 223). The Supreme Court has indicated that no matter how conclusive the evidence, a failure to permit the jury to resolve the question requires a reversal (*United Brotherhood of Carpenters, etc. v. United States,* 330 U.S. 395 [1947]).

The common law rules of agency apply under the Labor Management Relations Act, as amended. The

term "agent" as used in §301 of the Labor Management Relations Act, as amended, 61 Stat. 156, 29 U.S.C. 185, requires the application of the "ordinary law of agency"[7] (*Matter of Sunset Line & Twine Co.*, 79 NLRB 1487 [1948]; *Matter of Perry Norvell Co.*, 80 NLRB 225 [1948]; cf. *Matter of Colonial Hardwood Flooring Co., Inc.*, 84 NLRB 563 [1949] [in which agency was admitted]).

The responsibility of a union, as principal, for damage resulting from sudden acts of violence engaged in by its members or members of an affiliate, is a subject which has resulted in important Supreme Court decisions (*The Coronado Cases*, 259 U.S. 344 [1922]; 268 U.S. 295 [1925]; *United Brotherhood etc. v. United States, supra*); in Congressional efforts to make certain that such responsibility be not imposed on mere speculation and surmise (§6, Norris-LaGuardia Act, 29 U.S.C.A. §106); and in decisions of the National Labor Relations Board (*Matter of Sunset Line & Twine Co., supra; Matter of Perry Norvell Co., supra; Matter of Colonial Hardwood Flooring Co., Inc., supra*)—all of which indicate the care needed in making agency determinations in this field.

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[7]The quoted phrase is from Senator Taft's analysis of the 1947 amendments, 93 Daily Cong. Rec. 700 [June 12, 1947]. The legislative debates and committee reports contain numerous other statements to the same effect by proponents of the amendments. See House Conf. Rept. No. 510, 80th Cong., 1st Sess., 36; 93 Cong. Rec. [Sen.] 6599 [June 5, 1947]; *id.*, 7001 [June 12, 1947].

The determination of whether an agency relationship exists is peculiarly a question of fact where, as here, the scope of the agency is unclear. Thus a person can perform services for another and become his agent in the performance of *those* services; that is, he may become the other's agent as to some acts and not as to others (*Restatement of Agency,* §227).

In the instant case there was not only the question whether certain named individuals were agents and for what acts but also, if they or any of them were agents, *whose* agents they were. For here, there was more than one alleged principal involved. In this posture of the case, then, and wholly irrespective of the sufficiency of the evidence, the agency determination was a fact question exclusively within the province of the jury to determine.

The effect of the refusal to allow the jury to determine whether an agency relationship in fact existed and if so, what it was and whether Local 8 or the International or both, or neither, were the principals with respect to these certain individuals, was to deprive appellants of a jury trial on an issue crucial to the liability of the unions involved.

Under the instructions as given by the Court, the jury might have found that it was the acts of Bodine which resulted in the imputed liability to the International. Yet Bodine was not even an employee of the International or Local 8. Or the jury might have found that it was the acts of Schmidt, a union employee who was in Hawaii throughout the period

herein involved, for which the International was liable. Yet there is no evidence that Schmidt acted in a representative capacity for the International with respect to the incidents at The Dalles. Liability of the International might have been based on a finding that Gettings was its agent, yet Gettings was not present in The Dalles throughout the period herein involved and did not participate in supervising or directing the conduct of Local 8's members. Meehan was the only individual among those named in the Court's instructions who was present in The Dalles and he was the only one of such individuals named as a defendant. Whether he was an agent of the International, or Local 8, or neither, was most sharply contested throughout this case.

Under appellants' proposed instructions and on the evidence in this record the jury might have found either that none of the individuals named were agents of the International or Local 8 or that those individuals who were found to be agents did not perform such acts within the scope of their employment or with prior authorization or subsequent ratification of the International or Local 8 as would have rendered the International or Local 8 liable.

But, under the instructions given, once prohibited conduct within the scope of employment was found, liability followed automatically even though such conduct was engaged in by one like Bodine who was not even an employee of either the International or Local 8. The withholding of this vital question of fact

from the jury, thus permitted the trial Court rather than the jury to determine liability, in violation of all well-known concepts of agency and in effect directed a verdict against both unions (*United Brotherhood of Carpenters, etc. v. United States, supra*).

II.

THE INCONSISTENCY OF THE VERDICT REQUIRES THAT IT BE SET ASIDE.

The verdict (TR 136) imposing liability on both appellants (unions) but exonerating all individual defendants, is inconsistent and illogical, and irreconcilable with any theory upon which this case was tried or presented to the jury. A verdict which is inconsistent for imposing liability on the principal while exculpating the agent, can be the result only of a misapplication of the law or a bias against the principal which require a reversal.

In this case the jury was correctly instructed that a union is an entity which can act only through human agents. (TR 1432.) In this case plaintiff claimed its damages arose from a "twenty minute" eruption of violence participated in by the individual defendants. (TR 228.) Therefore such union responsibility as is alleged to exist must rest on the conduct of the individuals who allegedly participated in that violence. But the verdict here exonerating all the individual defendants from liability means that no named in-

dividual engaged in any unlawful activity. Thus the verdict absolved the human agents from liability; yet inconsistently the jury found the unions liable.

This is not a logical abstraction, but in this case takes on real substance since several of the individual defendants who were exculpated—Baker and Christiansen on the one hand and Meehan on the other—were admittedly officers or employees of the union defendants and were charged by the Court to have been agents. Clearly the exoneration of these people raises serious questions as to the legal validity of a theory which can hold their "principals" liable.

A. The liability of the International and Local 8 could only derive from liability of individual defendants.

Under ordinary rules of agency, as well as under the instructions given by the Court below, it was necessary, in order to find the unions liable, to prove that union agents engaged in certain conduct within the scope of their employment. (TR 1432-1434.) Thus, since union liability depended upon, and was secondary to, the liability of the human agents, the verdict herein of non-liability of *any* union agent cannot be reconciled with liability of the unions.

> "* * * where employer and employee are joined as parties defendant in an action for injuries inflicted by the employee, a verdict which exonerates the employee from liability for injuries caused solely by the alleged negligence or misfeasance of the employee requires also the exoneration of the employer, and although the verdict

purports to hold the employer liable, it cannot form the basis of a judgment against the employer but must be set aside".

35 *Am. Jur.* 962, Master and Servant, §534.

See also:

Dixie Ohio Express Co. v. Posten, 170 F. 2d 446 (1948);

King v. Stuart Motor Co., 52 F. Supp. 727 (1943);

Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63 (1903);

16 *A.L.R.* 2d 969;

2 *Am. Jur.* 361, Agency §455;

53 *Am. Jur.* 726, Trial, §1049;

30 *Am. Jur.* 977, Judgment, §249.

The Supreme Court said in *New Orleans & N. E. R. Co. v. Jopes,* 142 U.S. 18 (1891):

"It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity * * * if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

These rules, applied here, require a reversal of the judgment against appellants.

It is no answer to say that liability might have been established against appellant-unions without the joinder of any individual defendants. This is not

that case. Here the individual defendants upon whose conduct the liability of the unions is said to depend *were* joined and their liability was drawn into question and adjudicated. And the adjudication was in their favor and consequently in favor of their principals. This fact cannot be gainsaid.

B. Even if the jury verdict merely means that it found no "conspiracy", the verdict is inconsistent.

Nor is it an answer to assert that the liability of the individuals was sought to be established on the basis of a "conspiracy theory" which somehow was different from the basis upon which the unions were sought to be held liable.

One of the issues set forth in the pretrial order was whether

> "* * * there [was] any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them" (TR 68.)

The Court instructed that the jury might find a conspiracy between Local 8 and the International *through their officers, agents and members* (TR 1434) and a conspiracy between "the individual defendants among themselves or together with the Defendants International and Local 8, or either of the unions * * * (TR 1436-1437.)

It is impossible to determine with certainty whether or not the jury found Local and International liable because of an alleged "conspiracy" or because of a

claimed Taft-Hartley violation.[8] As to the conspiracy, clearly the verdict as to the individual defendants exonerated them from liability for such a "conspiracy"; and since the unions could only so conspire through their human agents, officers and members, it must be that the jury verdict absolving the individuals from liability as conspirators means that the jury found that Local and International did not so conspire.

Upon the basis of the same damage alleged to have arisen from the same conduct by the same individuals at the same time and place[9] as grounded the cause of action purportedly stated under the Labor Management Relations Act, plaintiff sought to erect an additional common law liability upon the individual defendants by adding a charge of "conspiracy". But although the Court below treated the "conspiracy" allegation as though it created a separate ground of liability (TR 1435;[10] *Curto v. International Longshoremen's and Warehousemen's Union*, 107 F. Supp. 805, 812 [1952]), the "conspiracy" allegation added nothing of distinguishable legal or factual substance to plaintiff's statutory claim for relief.

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[8]That the jury was improperly charged on the latter score, and that a verdict based on this theory is not sustainable, is discussed, *infra*.

[9]Plaintiff's counsel admitted that the same facts and the same witnesses were involved. (TR 228.)

[10]Although appellants deny that a common law liability could have been stated against the individual defendants in view of the preemption of the field by federal legislation, so far as the jury was instructed, a verdict imposing liability on the individuals could have been returned.

The Court instructed the jury with regard to the alleged "conspiracy" that "It is sufficient if the evidence shows a *concert of action* between two or more persons to accomplish an unlawful purpose". (RT 1438.) Such an instruction accords with the distinction regularly made between civil and criminal conspiracy, namely, that in civil conspiracy the agreement or combination does not receive the stress that it does in criminal conspiracy.

> "The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable".
>
> 11 *Am. Jur.* 577, Conspiracy, §45.

See also:

> *Brictson v. Woodrough,* 164 F. 2d 107 (1947);
> *Connolly v. Gishwiller,* 162 F. 2d 428 (1947);
> *Calcutt v. Gerig,* 271 F. 220 (1921).

Under these instructions, the jury could have imposed liability upon an *individual* defendant merely on proof that there was a "concert of action" to accomplish the alleged unlawful purpose between such defendant and any other individual or individuals or between such defendant and Local 8 or the International or both. Thus, the jury verdict necessarily established that none of the individual defendants engaged in a "concert of action" with any other individual *or with Local 8 or the International.*

Hence, the verdict of liability here as to Local 8 and the International, resting as it must upon a finding of unlawful acts performed by one or more individual defendants who stood in an agency relationship with either or both unions, cannot be reconciled with the verdict which exonerates *every such individual defendant* from liability for a "concert of action" to accomplish the same unlawful acts. For under the pleadings, the evidence and the instructions, a "concert of action" necessarily embraced the existence of an agency relationship and acts by agents within the scope of their employment to achieve an unlawful purpose. The failure to find such a "concert of action" requires a rejection of the finding that the principals were liable.

In view of the manner in which this case was presented to the jury by both Pineapple and the Court below, the verdict finding no liability for a "concert of action" to accomplish the unlawful purpose between any individuals or between any individual and the unions—especially in the case of Meehan whom the Court held to be an "agent" of both unions and who was the most active "agent" in relation to the occurrences at The Dalles—is illogical and contradictory and cannot be squared with a finding of agency or activity within the scope of agency so as to justify liability of the union principals.

Hence, although distinctions may be, and understandably will be attempted to be, made between an agency relationship and a civil conspiracy in general,

in this case the unions could not be held liable for acts of individuals while at the same time each and every individual was absolved from liability for a "concert of action" relating to the same acts.

It is notorious that "it is not uncommon for juries, activated by sympathy, bias, or mistake to return a verdict holding the master liable but exonerating the servant" (16 A.L.R. 2d 969). Whether the verdict in this case resulted from mistake or misapprehension of the law, or a bias against the unions involved, or from a sympathy toward the individual defendants—it must in any event be set aside. It is just not sustainable as a matter of law.

It is to be noted that early in these proceedings appellants moved that the personal injury suits (supra, n. 2) be severed from the suit brought by Pineapple because of the inherent danger of passion and prejudice present in the former actions. (TR 226.) Although this point is dealt with later in this brief in connection with the matter of excessive damages, it is not entirely without relevance here that the Court in denying appellants' request for severance (TR 227) helped to create a situation in which an inconsistent verdict based upon precisely the bias, prejudice and sympathy or mistake was possible.

Whatever the reason, one cannot rationally exculpate an agent while holding his master. The verdict must therefore be set aside.

III.

THERE WAS NO VIOLATION OF SECTION 303(a) OF THE TAFT-HARTLEY ACT.

A. Section 303(a) of the Taft-Hartley Act condemns only secondary—not primary—activity.

Section 303(a) of the Labor Management Relations Act of 1947, *supra,* reads in relevant part as follows:

> "It shall be unlawful * * * in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> "(a) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person."[11]

1. Section 303(a) has been so construed consistently.

The Courts and the Labor Board have uniformly interpreted this section as a ban only upon secondary activity. *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675; *NLRB v. International Rice Milling Co.,* 341 U.S. 665; *International Brotherhood of Electrical Workers v. NLRB,* 341 U.S. 694;

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[11]The following language of subsection (a) is omitted from the above quotation because it was not made the basis of the Court's charge (TR 1424-6) and is not deemed significant herein: "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or".

Douds v. Sheet Metal Workers International Association, 101 F. Supp. 273; *Oil Workers International Union and Pure Oil Co.,* 84 NLRB 315.

The Supreme Court explored the Congressional history of Section 158(a)—the unfair labor practice section of the Taft-Hartley Act, the language of which, so far as relevant, is identical with that contained in Section 303(a)—and said, in the *Denver Construction* case, *supra,* at page 686:

> "While §8(b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section is often referred to in the Act's legislative history as one of the Act's 'secondary boycott sections'. The other is §303 * * * *which uses the same language in defining the basis for private actions for damages caused by these proscribed activities.*"

In the companion *International Brotherhood of Electrical Workers* case, *supra,* at page 705, the Supreme Court said: "The substantive evil condemned by Congress in 8(b)(4) is the secondary boycott * * *" In construing this provision, the Labor Board has found that it was "clear from legislative history that [the section] * * * was aimed at *secondary* and not primary action." *Pure Oil Co., supra.*

2. Such a construction was necessary.

It was necessary for the Courts and the Labor Board to confine Sections 158(a) and 303(a) to secondary activity for "* * * read literally, 8(b)(4)(A) would invalidate most picketing." Comment, *The*

Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 684 (1951). It is difficult to conceive of any picket line established during the course of any labor dispute which does not have as one of its objectives the interruption of business between the employer at the picketed premises and some other employer or person. A cessation of business is usually the desired effect of any strike, and a picket line traditionally is the means to achieve such an effect. As the Supreme Court said in *NLRB v. International Rice Milling Co.,* 341 U.S. 665, 672-3:

> "That Congress did not seek, by §8(b)(4) to interfere with the ordinary strike has been indicated recently by this Court. This is emphasized in §13 as follows: 'Nothing in the Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' 61 Stat. 151, 29 U.S.C. (Supp. III) §163, 29 U.S.C.A. §163.
>
> "By §13, Congress has made it clear that §8(b)(4), and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act."

3. Section 303(a) prohibits the secondary boycott as it was formerly known.

Section 303(a) merely reinstates the secondary boycott law as it existed prior to the passage of the

Norris-LaGuardia Act. 29 U.S.C.A. §101 et seq. Senator Taft, who was the sponsor of the bill in the Senate and was the Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing this section:

> "* * * under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." (93 Cong. Rec. 4198.)

In a recent, well-reasoned opinion it was said

> "* * * the purpose of this provision of the Taft-Hartley Act was to outlaw the 'secondary' boycott, as constituting an unfair labor practice. Having then reached the conclusion that the unfair practice described in this section was that known under the common law as a secondary boycott, the trend of the decisions was to determine what a secondary boycott is." (*Douds v. Sheet Metal Workers International Association,* 101 F. Supp. 273, 276.)

B. Determining whether a secondary boycott exists is a complex question of law and fact.

What fact situations fall within the ban of Section 303(a) is not free from doubt. It has been observed that "Probably no other provision of the LMRA is as difficult to understand as Section 8(b)(4)(a)." Note, *Developments in the Law—The Taft-Hartley Act,* 64 Harv. L. Rev. 781, 798 (1951). The Supreme

Court has said that "* * * each case must be considered in the light of its surrounding circumstances * * *" *NLRB v. International Rice Milling Co.,* 314 U.S. 665, 670.

1. Clear definitions are available.

Judge Learned Hand authoritatively defined a secondary boycott in *International Brotherhood of Electrical Workers v. NLRB,* 181 F. 2d 34, 37, affirmed 341 U.S. 694, in the following language:

> "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands."

A secondary boycott has been said to exist

> "* * * when a labor organization having a labor dispute with employer A induces or encourages employees of employer B, with whom the union has no dispute, to refuse to handle goods or perform services for employer B, with the object of causing B to cease to do business with A, the employer with whom the union is involved in a labor dispute. In other words what is prohibited is any attempt to bring pressure to bear on 'secondary' employers who are neutral in the labor dispute for the purpose of effecting, by such measures, ultimate pressure upon the 'primary' employer." *Douds v. Sheet Metal Workers International Association,* 101 F. Supp. 273, 277.

2. There must be a primary labor dispute.

By definition, at least, a secondary boycott thus requires the existence of a primary employer, a secondary employer and a labor dispute between a union and the primary employer. Appellants are unaware of a secondary boycott case which does not include each of these elements. As the Court said in the *Sheet Metal Workers* case, *supra,* at 278:

> "Implicit in the idea of a secondary boycott is the fact that there is a labor dispute between a labor organization and an employer, and that the boycott charged is directed against another employer who is neutral to the dispute."

In rationalizing the latest Supreme Court cases which carefully examined the secondary boycott language of the Taft-Hartley Act, the Court there continued:

> "In cases recently decided by the Supreme Court, reported in 341 U.S., 71 S. Ct., referred to above, the facts in each case disclose the existence of a labor dispute between the labor organization involved and the employer with whom another employer is forced to cease doing business because of a 'boycott' directed against the second employer by the labor organization. In each case, the second employer against whom the 'boycott' was directed was regarded by the Court as a neutral in the dispute considered to be the cause of the practices of the union found to be contrary to law." *Ibid.*

3. Violence is immaterial.

It is of no significance in determining whether a secondary boycott exists that there has been picket

line violence. Thus, as the Supreme Court said in *NLRB v. International Rice Milling Co.,* 341 U.S. 665, 672:

> "The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with §8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."

In *Douds v. Metropolitan Federation,* 75 F. Supp. 672, the Court found primary rather than secondary activity despite picket line violence. *Cf. International Union of Auto Workers v. Wisconsin Employment Relations Board,* 336 U.S. 245, 253.

4. Complexities lead to conflict, or at least to a lack of uniformity, between the Courts and the Labor Board.

The complex legal and factual questions involved in many secondary boycott situations are further aggravated by the fact that both the Courts and the National Labor Relations Board afford remedies under identical statutory language. See e.g. *ILWU v. Juneau Spruce Corp.,* 342 U.S. 237. Compare *United Brick & Clay Workers v. Deena Artware,* 198 F. 2d 637, with *NLRB v. Deena Artware,* 198 F. 2d 645, in which on the same facts the Court upheld a jury award to Deena in the former, and upheld the Labor Board's dismissal of a complaint for a cease and desist order in the latter.

Especially with respect to the secondary boycott provisions of the Taft-Hartley Act does one find the

dichotomy between the judicial process and the administrative process in the field of industrial relations. A Court is challenged to make a complete and systematic investigation of the issues involved in the particular dispute in order to apply the secondary boycott provisions as uniformly, precisely and efficiently as the Labor Board—organized, equipped and staffed as it is with trained and experienced experts. See Millis and Brown, *"From the Wagner Act to Taft-Hartley"*, Chicago (1950), p. 75; Final Report, *Attorney General's Committee on Administrative Procedure,* Washington, D. C. (1941), pp. 11-17; Chang, *Secondary Pressures Under the Taft-Hartley Act,* 12 Lawyers Guild Review 55, 64 (1953).

It is submitted that the Court below was so overwhelmed by the legal and factual complexities involved in this case as well as the violence shown that it did not correctly apply the foregoing principles. The balance of this argument will demonstrate the most serious errors.

C. There was primary activity at The Dalles.

1. There was uncontradicted evidence of a labor dispute with the Port of The Dalles.

Both Local 8 and the International had jurisdiction over unloading operations at Oregan wharf facilities. There was evidence that Local 8 had performed unloading services at The Dalles prior to the incidents herein involved. (TR 766.) There was evidence of efforts to negotiate with the Port Commission of The

Dalles for the unloading of the pineapple barge.[12] (TR 766, 877, 900.) There was evidence that Local 8 feared the economic effect of the use by the Port of The Dalles of nonunion employees to unload the barge under substandard conditions. (TR 806, 807, 838, 900, 902, 1240, 1285-1286, 1365.) In response to a question put by appellee's counsel as to the reason for the picketing at The Dalles, Matt Meehan said:

> "For the reason that our wage structure and our hours of employment, conditions of labor, were being endangered; that the work was being carried on by members of other organizations, and we had contracts for that work in every port on the Pacific Coast. We were picketing because they were working the men 8 hours a day for a dollar and a half an hour, when our wage scale was $1.82 and time and a half after 6 hours. We were picketing because, too, we have a 2100-pound load limit in our contract, and these people were unloading as much as they could reach up and pile the cases on. They were breaking down our conditions." (TR 806.)

Appellants' evidence of primary activity directed against the Port of The Dalles was wholly uncontradicted.

The Court below erred in concluding that there was no primary labor dispute involving the Port of The Dalles.

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[12]Since the Port of The Dalles is not an "employer", picketing activity against it to achieve union conditions does not violate any provision of the Taft-Hartley Act.

2. There was uncontradicted evidence of primary activity against Hawaiian Pineapple.

Longshore agreements are frequently made with shipowners who have their own stevedores. At The Dalles it wasn't clear whose employees the stevedores would be. Local 8 was concerned with the persons who would unload the barge and the conditions under which they would work, irrespective of whether such persons were employees of the Port of The Dalles or of Pineapple. (TR 1285-1286.) Therefore, to the extent that the stevedoring was to be done by Pineapple's employees, primary picketing activity was conducted against Pineapple.

Furthermore, as will be shown below, appellants were prepared to show a unity of interest between Pineapple and the Hawaiian longshore employers if Pineapple sought to picture those employers as the primary employer and Pineapple as a neutral secondary employer. As the case proceeded, however, it became clear that neither appellee nor the Court did anything more with this theory than permit it to obscure the actual charge and the proof.

The Court below erred in concluding that there was no primary labor dispute involving Pineapple.

D. The Court below erroneously gave no effect to the primary activity.

1. As to The Dalles.

The Court below instructed the jury that it might consider whether conversations between certain longshoremen and Pineapple's truck drivers were for the

purpose of inducing said employees to take concerted action to refuse to perform services for Pineapple and whether the object of such inducement was to force any person to cease dealing with Pineapple. The Court further instructed that it might find such conduct illegal even if the drivers were told "that the Port of The Dalles was threatening the working conditions and wages of the Portland longshoremen * * *" (TR 1427.)

The vice in this instruction is that if, as appellants contend, there was primary activity against the Port of The Dalles, the conversations with the truck drivers were privileged. *NLRB v. International Rice Milling Co.,* 341 U.S. 665.

But the Court below did not find it necessary to determine whether there was a primary labor dispute involving the Port of The Dalles. Instead, it merely instructed "That the Port of The Dalles is not 'an employer' or 'other person'." (TR 1424.) Although this instruction is correct, it did not require that the primary dispute with The Dalles be read out of the case for all purposes.

The Court also instructed the jury that:

> "If you find that neither of the defendant unions induced or encouraged the employees of an employer, as plaintiff claims, or that such inducement or encouragement was *solely* for the purpose of concerted activity on account of wages, hours or conditions of employment, as the defendants claim, or to obtain jobs for themselves, then your verdict should be for all of the defendants." (TR 1429.)

Clearly, if the activity directed against the Port of The Dalles was primary activity, the emphasis resulting from the use of the word "solely" imposed too heavy a burden upon appellants. Under this instruction, the Court blurred the distinction between secondary activity with a secondary *object* and primary activity with a secondary *effect*.

Open to the same objections as are stated above, is the instruction of the Court that:

> "If you find one of the objects of any inducement or encouragement was to force any person to cease doing business with any other persons it would make no difference that the International or Local 8 or the persons whom you find, if you do, were inducing or encouraging, had other objects therein, such as conducting a strike on account of wages, hours or conditions of employment of employees of the Port of The Dalles, or such as forcing or requiring the Port of The Dalles to assign the particular work of unloading the barge to employes of Local 8 rather than to employes in another class. In other words, the forcing of a person to cease doing business with another person, if that be one of the objects of the inducement or encouragement, would be sufficient, even though there might be other legitimate objects in mind.
>
> "Even if any acts done or performed by any defendant union were for the purpose of achieving legitimate ends of collective bargaining and the legitimate ends and purposes of trade unionism, such as the prevention of the breaking down of wages and working conditions of Local 8, still,

> if a defendant union or two or more defendant unions in concert induced or encouraged employes of any employer, in restraint of trade and commerce, as above described, but another object thereof was to force any person to cease dealing with Hawaiian Pineapple Company, then the plaintiff should prevail on that issue." (TR 1430.)

This instruction cannot be squared with *NLRB v. International Rice Milling Co.,* 341 U.S. 665, or with the Court's explanation of that case in *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675. In the latter case the Court said (at 687-8) that in the *International Rice Milling* case, the union "did not engage in a strike" against the "neutral" (herein also there was no strike against any "neutral"); and that the union "did not encourage concerted action" by the "neutral's" employees (herein, as will be shown below, the Court's instructions provided no guidance to the jury in distinguishing between action which is "concerted" and that which is not "concerted").

Each of the foregoing instructions, and, all of them when read together, disclose an erroneous failure to consider whether a labor dispute existed between the unions and the Port of The Dalles, and if so, what effect such dispute, in the light of recent Supreme Court decisions, particularly the *International Rice Milling* case, *supra,* should have been given in the conduct of the trial and in the applicable instructions. If the secondary boycott provisions of the Taft-Hart-

ley provisions are difficult for the Courts and the Labor Board fully to understand and apply, it would seem unlikely that a jury, impassioned by the trial at the same time of two assault cases with evidence of violent injury to persons and property, would fare better under vague, general and legally inaccurate instructions which blur several crucial distinctions in the field.

2. As to Hawaiian Pineapple.

Plaintiff below alleged, in its first amended complaint (TR 30) the existence of a labor dispute between International and its Hawaiian Local and the Waterfront Employers Association of Honolulu. (TR 32.)[13]

Appellants contended that Pineapple was a wholly owned subsidiary and alter ego of certain members of the Waterfront Employers Association (TR 63) and, accordingly, there was posed in the pretrial order (TR 50) as one of the issues the question whether: "* * * the Hawaiian Pineapple Company [was] a subsidiary of Castle & Cooke or any other member of the Big Five and, therefore, the strike as alleged, if any, [was] a primary strike within the meaning of the Taft-Hartley Law?" (TR 67).

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[13]The first amended complaint embraced a conspiracy charge. The original complaint did not allege the existence of a labor dispute in Hawaii. Technically, therefore, it would seem that the Hawaiian labor dispute can be no part of the alleged violation of Section 303(a). Without conceding this point, appellants herein treat the Hawaiian labor dispute allegation as though it had relevance to the asserted violation of Section 303(a).

In order to meet the issue thus raised appellants consistently contended throughout these proceedings that Pineapple had such an identity with the Hawaiian employers with whom International and the Hawaiian Local were engaged in a dispute that any activity by International directed against Pineapple at The Dalles was primary activity. Thus appellants introduced evidence relevant to this contention (TR 537, 541, 1072); made an offer of proof thereupon which was rejected by the Court (TR 1177) (See *Curto v. I.L.W.U.*, 107 F. Supp. 805, 815); requested an instruction embodying the gist of this contention (TR 1486); and objected to the Court's refusal to give an instruction to the jury bearing upon this theory (TR 1453).

As appellants' counsel put it in excepting to the Court's instructions:

> "* * * there is evidence from which the jury could find that this was a primary boycott against a corporation which was so intimately connected with those that were involved in the strike in Hawaii that the jury would have a right to find that this was a primary boycott. And since there is such evidence we think we are entitled to an instruction expressing our theory of the case so that the jury would have an opportunity to choose that theory if they so found from the evidence." (TR 1453.)

To this the Court responded:

> "I don't think that we are here to try out the economy of Hawaii. So far as I am concerned

> I am not going to import any Hawaiian labor troubles into the United States. This, I think, is an attempt to import both problems into this Court. There is no evidence in this record of the supposed domination.[14] It may have been error to exclude it but I don't think it was. There is no evidence in the record, so it is not a proper question to go to the jury. In the second place there is no evidence in this record that there was any strike which involved the Hawaiian Pineapple Company.[15] In the third place, there is no direct evidence in this case of any lawful strike with which this particular picket sent over here was concerned."[16]

Prior to making the offer of proof, appellants' counsel said:

> "And thus we expect to show that actually Castle & Cooke, being one of the firms against whom this strike was directed in the Islands that they in turn, through their stock directorates and through their stock ownership, control the Hawaiian Pineapple Corporation, so that they are actually the other hand of Castle & Cooke to the end that it is actually a primary strike so for as Hawaiian Pineapple is concerned." (TR 1173-1174.)

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[14]For evidence of dominance see TR 537, 541, 1072.

[15]This was the question at issue, to-wit: whether because of dominance there was a labor dispute with Hawaiian Pineapple.

[16]There was evidence of the Hawaiian strike. See e.g. Tr. 494, 501. Its lawfulness was to be presumed in the absence of evidence to the contrary offered by plaintiff who had the burden of proving a secondary boycott. *Cf. Sheet Metal Workers* case, *supra* at 277, to the effect that petitioner for an injunction must establish "that the act or acts of respondent constitute a secondary boycott."

By rejecting the offer of proof and by excluding the evidence of domination, the Court below ruled, in effect, that even if Pineapple were shown to be dominated by and the alter ego of Castle & Cooke, it would have no effect upon the alleged boycott. Thus the Court said of the attempt to prove domination: "Even if you found it out, this hasn't anything to do with the strike in the Hawaiian Islands". (TR 1175.)

Subsequently, in his instructions to the jury the Court said:

> "The presence of a member of the Hawaiian Local at the entrance to the property of the Port of The Dalles, *whatever his purpose* or that of his local, furnished no justification or excuse for any action or for picketing or for inducement or encouragement of other persons or employees by the International or Local 8 or any members thereof.
>
> "If you find that a member from the Hawaiian Local had *a legitimate reason* for his presence at the entrance of the Port of The Dalles, that would furnish no reason, justification or excuse for any action you may find by the International, Local 8, or any member thereof.
>
> * * * * * * *
>
> "There is no evidence in this case that this was a primary strike as far as the Hawaiian local was concerned." (TR 1431.)

The cumulative effect of the foregoing instructions together with the Court's exclusion of the "domination" evidence was that even if it were proven that Hawaiian Pineapple was within the "ally doctrine"

(see *Douds v. Metropolitan Federation,* 75 F. Supp. 672 which would have resulted in a finding that there was primary activity against Pineapple so far as the Hawaiian strike was concerned, such proof nevertheless would not reach the charge of secondary activity as affecting the employers and employees at The Dalles. Thus, apparently, the Court below had concluded that the secondary boycott alleged did not involve the Hawaiian strike. Only such an interpretation will give meaning to the Court's instruction that a legitimate purpose of the Hawaiian picket at The Dalles would not affect the liability of International in view of the *Metropolitan Federation* case, *supra.* Certainly the mere distance from Hawaii alone is not enough to suggest a different construction. See *Schultz Refrigerated Service, Inc.,* 87 NLRB 502 (1949); *Moore Drydock Co.,* 92 NLRB 547 (1950); *Cf. Sterling Beverages, Inc.,* 90 NLRB 401 (1950). Nor would the joining of the Hawaiian picket by members of Local 8 change the result. *NLRB v. International Rice Milling Co.,* 341 U.S. 665, 669.

If the Hawaiian strike is given any effect in these proceedings, then appellants were entitled to show, if they could, that Pineapple, as the alter ego of Castle & Cooke, was a legitimate target of primary activity. Since appellant was prevented from making that showing, the Hawaiian strike may not be allowed into these proceedings with its "brooding omnipresence" for any purpose. These proceedings must then be treated as though the allegedly illegal secondary

activity involved only the employers and employees at The Dalles.

It should be noted here that the effect of the rulings thus far considered is that neither the Port nor Pineapple was a primary employer. Since the existence of a primary labor dispute is a prerequisite to secondary activity, there cannot on the record thus far discussed be any finding of such prohibited activity.

E. The instructions of the Court below upon the elements of liability under Section 303(a) were erroneous.

The heart of the instructions of the Court below appears at transcript pages 1424-1426. The first portion of these instructions is as follows:

> "If the Plaintiff Hawaiian Pineapple Company, Ltd., has established by a preponderance of the evidence that the International, by and through its officers and agents, and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8, induced or encouraged the employes of Plaintiff Hawaiian Pineapple Company, Ltd., to engage in a concerted refusal in the course of their employment to transport, handle or work on the cargo of pineapple in commerce, or to perform any services in connection therewith at The Dalles, Oregon, with the object to forcing or requiring Plaintiff Hawaiian Pineapple Company to cease doing business with the Union Pacific Railroad, one of the various trucking companies whose names I gave you a few minutes ago, the Goodat Crane Company, or any of them, or with its

> customers in the State of California, to whom the cargo was to be shipped, or any of them, and it is further established that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover as against the defendant union or defendant unions doing the acts with the intent described."

This instruction permits the jury to find union liability for the alleged unlawful activity if it finds that the unions induced or encouraged the employees of Pineapple to engage in a concerted refusal to work on the cargo of pineapple, with the object of forcing Pineapple to cease doing business with the Union Pacific Railroad, one of several trucking companies, the Goodat Crane Company, or any of them, or with its customers in the State of California, with resulting business and property damage to the plaintiff herein.

This instruction thus treats Pineapple as a secondary employer whose employees are induced to withhold their services in order to apply pressure upon the "primary" employers—the railroad, the trucking companies, the Goodat Crane Company, or California customers. It is clear from the record herein, however, that there was not the slightest hint of a primary dispute involving any of the employers with whom the instruction deals as if they were primary employers. This instruction taken by itself is self-contradictory. First of all, there is clearly no primary dispute with any of the employers named in the instruction. Secondly, it seeks to establish a rule

that a union picketing certain premises in order to force the employer at the picketed premises to cease doing business with other employers with whom there is no primary dispute, may be liable under Section 303(a). However in the absence of a primary dispute with others the picketing activity at the premises of the picketed employer must by hypothesis be primary activity, in which incidental inducements to other employers do not fall within the ban of Section 303(a).

With respect to the Union Pacific Railroad, appellants contend that said railroad is neither an "employer" nor a "person" within the meaning of Section 303(a) and therefore that if there was an effort to force Pineapple to cease doing business with the Union Pacific Railroad, such effort is not within the ban of Section 303(a). Moreover, even if the railroad is a "person", the evidence in this case fails to disclose that Pineapple was forced to cease doing business with the railroad. *One of Pineapple's agents testified that the railroad did not want to do business with Pineapple because it had insufficient equipment to do so and did not wish to engage in a one-way haul.* (TR 1034-5.)

Under these instructions the jury could have imposed liability on both unions because Pineapple was forced to cease doing business with the railroad. Since this was not justified the judgment below must be reversed.

The case with respect to the Goodat Crane Company is no stronger. Pineapple was not forced to cease

doing business with the Crane Company as a result of any inducement by appellants. The evidence is to the effect that an employee refused to cross the picket line at The Dalles because of the rules of *his* union. (TR 882.) After the purchase of the crane by Pineapple on September 27, 1949, the day *before* the riot, there could have been no cessation of business with the Goodat Crane Company.

If the jury imposed liability upon the unions on the theory that Pineapple was forced to cease doing business with Goodat Crane Company, as it might have under the instructions, the judgment below must be reversed.

With respect to the "various trucking companies" mentioned in the instruction, the evidence does not support the theory that Pineapple was forced to cease doing business with any of them. There was testimony by Agent Gradel of the Portland-Pendleton Motor Transport Company that not only was there no cessation of business, but that *business between the two had never commenced.* (TR 586-7.) With respect to Consolidated Freightways, there was testimony from its Manager centers that negotiations were broken off *because of an insufficiency of equipment.* (TR 1007.) This testimony was corroborated by Botley, an official of Pineapple, who said that Consolidated *did not want to make a one-way haul* (TR 1034-5), *and claimed it had insufficient equipment.* (TR 1163.) There was also uncontradicted evidence that the Nevada Fast Freight Trucking Company *had*

insufficient equipment and consequently *did not choose to do business with Pineapple.* (TR 1034-5, 1163.)

The second portion of this important instruction is as follows:

> "Similarly, if plaintiff has established by a preponderance of the evidence that the International, by and [1714] through its officers and agents and Local 8, and Local 8 itself, through its officers, agents and members, or either the International or Local 8 induced or encouraged the employes of either the Goodat Crane Company, the Portland-Pendelton Motor Transport Company, Consolidated Freightways, Oregon-California-Neveda Fast Freight or any other trucking lines doing interstate business from The Dalles, Oregon, to engage in a concerted refusal in the course of their employment to refuse to transport, handle, work on or perform any services in connection with plaintiff's cargo or with the object of the forcing or requiring either Goodat Crane Service or any of the trucking lines, or both, to cease doing business with the plaintiff, and you further find that as a direct and proximate result thereof plaintiff sustained damage to its business and property, plaintiff would be entitled to recover." (TR 1425-6.)

This instruction proceeds upon a theory which is precisely the opposite of, and is inconsistent with, the former portion of this instruction. It purports to make Pineapple the primary employer and the Goodat Crane Company, the Portland-Pendleton Motor Transport Company, Consolidated Freight-

ways, Oregon-California-Nevada Fast Freight, or any other trucking lines doing interstate business from The Dalles, Oregon, secondary employers. This inconsistency demonstrates that the Court was having difficulty in determining where there were primary and where there were secondary employers. This inconsistency alone requires a reversal, for it places upon the jury the burden of determining, along with the facts, the complex legal question of which of several employers was a primary employer and which of several employers was a secondary employer.

Furthermore, the Court's instruction to the effect that Pineapple is a primary employer contradicts the Court's earlier ruling that there was no primary dispute involving Pineapple.

The fundamental error referred to above, namely, that appellants' contention that primary activity was directed against The Dalles, was ignored by the Court, should be taken into account at this point in order to demonstrate that if appellants' hypothesis were accepted, the incidental effect of forcing employers to cease doing business with Pineapple, would be a legitimate objective, not violative of Section 303(a). Also, if appellants' contention is accepted, as would appear to be borne out in the above instruction, namely, that primary activity was directed against Pineapple in order to assure the unloading of the barge under union conditions, then the inducement of employees of other employers not to cross the picket line does not constitute a violation of Section 303(a).

With respect to the Goodat Crane Company, appellants contend that the evidence does not disclose a concerted refusal of the employees of Goodat. (TR 882.) A person's refusal to cross a picket line does not show an inducement or encouragement toward concerted activity. (*N.L.R.B. v. International Rice Milling Co.,* 341 U.S. 665.) The Court correctly instructed that such inducement or encouragement could not be shown after the crane was purchased by Pineapple. The Court's instructions, however, did not point out that under the prior lease arrangement the crane operator might have been an employee of Pineapple rather than of the Crane Company.

Did the jury impose liability upon the unions because of the inducement or encouragement of "concerted refusal" on the part of the crane operator? If so, the judgment below must be reversed.

With respect to the trucking companies mentioned in the above instruction, there was no evidence of a Section 303(a) violation. The evidence shows that no employees of Portland-Pendleton Motor Transport Company were induced or encouraged to engage in a concerted refusal. The only evidence is to the effect that the *employer* was approached. (TR 587.) Moreover, the evidence discloses that there was no cessation of business, for *a business relationship was never commenced.* (TR 586-7.) With respect to Consolidated Freightways, the evidence does not reveal inducement or encouragement of its employees to engage in a concerted refusal. The only evidence is to

the effect that Consolidated Freightways refused to deal with Pineapple *because its equipment was insufficient* (TR 1007) and therefore broke off negotiations (TR 1034-5, 1163). With respect to the Oregon-California-Nevada Fast Freight, the only evidence was that this company refused to deal with Pineapple *because of insufficient equipment.* (TR 1034-5, 1163.)

Both portions of the instruction set forth above, when read together, not only presented a confused, inconsistent picture to the jury which did not establish for it a secondary boycott situation in which a neutral employer is exposed to pressure in order to force the primary employer to come to terms with the union, but they also seem to establish a rule far beyond the scope of Section 303(a), namely, that if there was activity at The Dalles which prevented the unloading of the barge under other than union conditions, there was a 303(a) violation.

F. Any "secondary" activity at The Dalles was incidental.

It has been shown above that there was primary activity at The Dalles conducted in order to secure the unloading of the pineapple barge by union members and under union conditions. To the extent that the picketline activity had the *effect* of preventing the unloading of this barge, it is not to be equated with an unlawful 303(a) *objective* of inducing and encouraging the employees of neutral employers to cease doing business with the primary employer. Appellants contend herein that the secondary boycott provisions contained within Section 303(a) are to be

applied in this case the same way, despite the violence revealed in the evidence, as it would be applied if the damage to Pineapple resulted from the patrolling of a single, peaceful picket. If the inducement and encouragement of the employees of neutral employers resulted from peaceful picketing, it would be nonetheless a secondary boycott if the essential elements of Section 303(a) were otherwise present. Appellants herein contend that the *effect* of successful primary activity is not the same as an unlawful dominant *objective* of requiring secondary employers to cease doing business with primary employers.

G. Conclusion.

Section 303 of the Taft-Hartley Act had as its target certain specific types of union pressure which have been traditional in labor's arsenal. Section 303(a) was drafted, as has been demonstrated, in order to reach labor's historic use of the secondary boycott. In order to impose liability and damages upon a union organization under the terms of Section 303(a) it is necessary that the conduct charged and proven be strictly within the terms of this section. Appellants contend that that has not been the case here.

This is not to suggest that appellee might not have had other remedies available to it. It is not herein asserted that appellee's claim for damages ought to go wholly uncompensated. Appellants do contend—and most seriously—that appellee should not recover under the secondary boycott provisions of Section

303(a) without having established that a secondary boycott exists.

IV.

THE FAILURE TO MINIMIZE DAMAGES REQUIRES A REVERSAL OF THE JUDGMENT.

The stupendous verdict rendered in this case—for over $200,000—represents every penny which Pineapple asked for. Yet the record is clear that Pineapple consciously and deliberately passed up and ignored ample opportunity for minimizing its damages.

That it had a duty to take reasonable steps to prevent or reduce its damages is unquestioned. *United States v. Brookridge Farm,* 111 Fed. 2d 461; *John S. Doane Company v. Martin,* 164 Fed. 2d 537; *Texas Company v. Christian,* 177 Fed. 2d 758; *Isthmian SS. Co. v. Jarka Corp.,* 100 Fed. Supp. 856.

The bulk of Pineapple's claimed damage occurred at the San Jose plant of its Barron Gray Division. This plant was engaged in the canning of fresh fruits and vegetables; one of its principal products was canned fruit cocktail, an ingredient of which was pineapple. (TR 937.) It was the delay in the delivery of the pineapple on the barge here in question that was claimed to have resulted in "excess factory cost" of almost $150,000. (TR 948-9.) But the record is clear that this loss could either have been avoided or at least substantially minimized.

In order to manufacture this fruit cocktail, the Barron Gray Division normally purchased fruits other than pineapple from fruit growers a few months before the packing season began. (TR 959-960.) In 1949, despite the fact that it had knowledge as early as May 1st that there was a strike in the Islands (TR 958), and that its contracts with the growers permitted cancellation "in the event of labor difficulties" (TR 959, 1292-3), the Company continued to purchase and accept fresh fruit from the growers. This it did all through the summer of 1949 until as late as the middle of September, after the strike with its interruption of Hawaiian shipping had been in effect for over three and one-half months and at a time when it was quite uncertain that any pineapple at all would be delivered (TR 963).

The Company simply chose to run the risk of this tremendous loss despite the fact that it had a clear and reasonable opportunity to avoid it. This, in effect, was the admission of its own assistant treasurer.

> "Q. You could have cancelled all of the fruit which is the subject of this $142,000, couldn't you?
>
> A. Yes.
>
> Q. You didn't choose to do it, did you?
>
> A. No." (TR 968.)

Clearly, a reasonably prudent businessman would not have continued to purchase fresh fruit in the face of the strike, especially since his contracts permitted him to withdraw from the obligation to purchase. Any loss sustained as a result of such con-

tinued purchase resulted proximately not from the alleged conduct of appellants, but from the failure of Pineapple to exercise sound business judgment to keep its losses at a minimum.

Texas Co. v. Christian, 177 F. 2d 579, at 761 (1949).

With the fresh fruit accumulating on its hands during the summer of 1949, Pineapple faced various alternatives. As indicated, it could have but did not cut down upon its purchases. Furthermore, it could have made efforts to obtain other pineapple to put into its fruit cocktail. Non-Hawaiian pineapple was available to it. (TR 1288-90.) While its contention that such pineapple wasn't quite as good as Hawaiian pineapple may be true, it is submitted that it was unreasonable for the Company to continue to accept fresh fruit while refusing to use non-Hawaiian pineapple. If it intended not to use non-Hawaiian pineapple, it should not have continued to accept other fresh fruits for the duration of the strike.

Or, the Company could have put up the other fruits without pineapple as either a fruit mix or separately as canned pears, apricots, grapes, etc. (TR 970-971) and sold them under any one of 100 different labels (TR 969-70). It had in past years put up separate quantities of individual fruits and had a market for them. (TR 1155.) Although this method of minimizing its damages was also available to it, it did not consider it. (TR 981.)

Instead—and this is the point at which the overwhelming bulk of its damages occurred—it put up

the fruits in a form which it knew they could not sell (TR 1292) and stored them in that condition until the pineapple finally arrived, and then reprocessed the fruits and the pineapple into fruit cocktail. Its principal damages arose from the cost of the cans and the labor that was required in this extra, and as indicated above, unnecessary, operation. As was said in another case, Pineapple's

> "conduct in dealing with these shipments and making claims for loss * * * was obviously strategic, and stemmed from the defendant's refusal to accede to [its] demand that [the pineapple be unloaded under non-union conditions at The Dalles] as well as from [its] interest in enhancing [its] alleged damages for the purposes of this law suit." (*American Can Co. v. Russellville Canning Co.,* 191 Fed. 2d 38 at 55.)

Even if the damages for this operation are attributable to these appellants, it is clear that the amount recovered was in excess of what Pineapple was entitled to. Included in the recovery was the cost of some 138,000 cases of cans which were used for storing the fruits until the Pineapple arrived. But this figure included almost 25,000 cases which were put up on September 26th and 27th, and almost 17,000 cases which were put up on September 28th. The barge did not arrive at The Dalles until the 26th and clearly the damages for the 26th and 27th could not be attributable to the appellants, and it is unlikely that the damage for the 29th could. Thus, more than 25 per cent of the loss would have occurred whether or not the barge was unloaded on the 26th

of September, the very day that it arrived at The Dalles.

All of these factors, which should have substantially reduced the amount of recovery, were ignored by the jury and, as indicated, every last penny prayed for was recovered.

This is not defensible and is explicable only by the passion and the prejudice which the record in this case must have aroused. However, passion and prejudice cannot take the place of evidence and no matter how sympathetic the jury might have been to the plaintiff, it had no right to award it damages except for such losses as it suffered as a proximate result of appellants' unlawful conduct. To the extent that the verdict represents an assessment of damages in excess of the amount which the rule of law permits, it must be set aside.

Or this Court may, by its remittitur, reduce the amount of damages. (*United States v. Brookridge Farm,* 111 F. 2d 461, 465; *Texas Co. v. Christian,* 177 F. 2d 759, 762.

For the foregoing reasons, the judgments below against appellant unions must be reversed.

Dated, San Francisco, California,
July 29, 1953.

Respectfully submitted,
GLADSTEIN, ANDERSEN & LEONARD,
By NORMAN A. LEONARD,
Attorneys for Appellants.